



**In the Matter of:**

**CHRISTOPHER J. HOFF,**

**ARB CASE NO. 03-051**

**COMPLAINANT,**

**ALJ CASE NO. 2002-STA-6**

**v.**

**DATE: May 27, 2004**

**MID-STATES EXPRESS, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

*Joanne Kinoy, Esq., Kinoy, Taren and Greghty, P.C., Chicago, Illinois*

*For the Respondents:*

*Richard M. Furgason, Esq., Dreyer, Foote, Streit, Furgason & Slocum, P.A., Aurora, Illinois*

### **FINAL DECISION AND ORDER**

This case arises under the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended, 49 U.S.C.A. § 31105 (West 1997) and implementing regulations at 29 C.F.R. Part 1978 (2003). On August 29, 2001, Christopher Hoff filed a complaint with the Occupational Safety and Health Administration (OSHA) in which he alleged that his employment “was terminated by his employer, Mid-States Express, Inc. (Mid-States) for refusing to operate a commercial motor vehicle in violation of federal motor carrier safety regulations and for filing a complaint with the United States Department of Transportation’s Federal Motor Carrier Safety Administration (FMCSA).” OSHA found that Hoff’s complaint was untimely, whereupon Hoff requested a hearing before an Administrative Law Judge (ALJ). The ALJ held a hearing on July 2 and 3, 2002, during which both parties addressed the merits of Hoff’s complaint. On February 3, 2003, the ALJ issued a Recommended Decision and Order (R. D. & O.) finding that Hoff’s complaint was untimely. We affirm the R. D. & O.

## BACKGROUND

The record fully supports the ALJ's factual and procedural history set forth at pages 1-4 of the R. D. & O. To summarize, Mid-States hired Hoff in 1998 as a dock man and eventually as a driver. On August 24, 2000, Hoff submitted a letter to the FMCSA in which he alleged that his employer, Mid-States, had violated federal motor carrier safety regulations. Hoff testified that he informed Mid-States' management of this letter.

Hoff's employment with Mid-States ended on September 11, 2000. *See* R. D. & O. at 3. About one week later Hoff again contacted the FMCSA to inform it that Mid-States had terminated his employment. Transcript at 73-74. He testified that he continuously contacted FMSCA to discuss the allegations contained in his letter. On July 31, 2001, FMSCA contacted Hoff by letter and informed him that Mid-States had been investigated, violations found, and citations issued. It was only after the receipt of this letter that Hoff realized that the FMSCA had investigated his claims under the Federal Motor Carrier Safety Act and not under the Surface Transportation Assistance Act<sup>1</sup> and was not investigating his retaliation claim. Complainant's Brief at 2. He thereafter filed his claim with OSHA on August 29, 2001, more than 180 days after Mid-States allegedly discharged him.

## JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board the authority to issue final agency decisions under, *inter alia*, the STAA and the implementing regulations at 29 C.F.R. Part § 1978. Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). This case is before the Board pursuant to the automatic review provisions found at 29 C.F.R. § 1978.109(a).<sup>2</sup> Pursuant to 29 C.F.R. § 1978.109(c)(1), the Board is required to issue "a final decision and order based on the record and the decision and order of the administrative law judge."

When reviewing STAA cases, the Administrative Review Board is bound by the ALJ's factual findings if they are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 44 (2d Cir. 1995); *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 01-STA-38, slip op. at 2 (ARB Feb. 19, 2004). Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might

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<sup>1</sup> FMCSA has responsibility for investigating alleged violations of the Federal Motor Carrier Safety Act and regulations thereunder. It does not have responsibility for investigating allegations of violations of the Surface Transportation Assistance Act.

<sup>2</sup> This regulation provides, "The [ALJ's] decision shall be forwarded immediately, together with the record, to the Secretary for review by the Secretary or his or her designee."

accept as adequate to support a conclusion.” *Clean Harbors Env'tl. Services, Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)); *McDede v. Old Dominion Freight Line, Inc.*, ARB No. 03-107, ALJ No. 03-STA-12, slip op. at 3 (ARB Feb. 27, 2004).

In reviewing the ALJ's conclusions of law, the Board, as the designee of the Secretary, acts with “all the powers [the Secretary] would have in making the initial decision ... .” 5 U.S.C.A. § 557(b) (West 1996). Therefore, the Board reviews the ALJ's conclusions of law de novo. See *Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *Monde v. Roadway Express, Inc.*, ARB No. 02-071, ALJ Nos. 01-STA-22, 01-STA-29, slip op. at 2 (ARB Oct. 31, 2003).

## DISCUSSION

The STAA protects employees making complaints relating to violations of commercial motor vehicle safety requirements from employer retaliation affecting their pay, terms, or privileges of employment. 49 U.S.C.A. § 31105(a)(1)(A).<sup>3</sup> Employees alleging employer retaliation in violation of the STAA must file their complaints with OSHA within 180 days after the alleged violation occurred. 29 C.F.R. § 1978.102 (c). The STAA limitations period is not jurisdictional and therefore is subject to waiver, estoppel, and equitable tolling. *Hicks v. Colonial Motor Freight Lines*, No. 84-STA-20 (Sec'y Dec. 10, 1985); *Nixon v. Jupiter Chem., Inc.*, No. 89-STA-3 (Sec'y Oct. 10, 1990); *Ellis v. Ray A. Schoppert Trucking*, No. 92-STA-28 (Sec'y Sept. 23, 1992). The regulations implementing the STAA discuss equitable tolling:

[T]here are circumstances which will justify tolling of the 180-day period on the basis of recognized equitable principles or because of extenuating circumstances, e.g., where the employer has concealed or misled the employee regarding the grounds for discharge or other adverse action; or where the discrimination is in the nature of a continuing violation. The pendency of grievance-arbitration proceedings or filing with another agency are examples of circumstances which do not justify a tolling of the 180-day period.

29 C.F.R. § 1978.102(d)(3) (emphasis supplied).

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<sup>3</sup> “A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because ... the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding . . . .”

In determining whether equitable principles require the tolling of a statute of limitations such as that contained in the STAA, the Board has also been guided by the discussion of equitable tolling of statutory time limits in *School Dist. of Allentown v. Marshall*, 657 F.2d 16, 19-21 (3d Cir. 1981). In that case, which arose under whistleblower provisions of the Toxic Substances Control Act, 15 U.S.C.A. § 2622 (West 2004), the court articulated three principal situations in which equitable tolling may apply: when the defendant has actively misled the plaintiff regarding the cause of action; when the plaintiff has in some extraordinary way been prevented from filing his action; and when “the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum.” *Allentown*, 657 F.2d at 20 (internal quotations omitted). See, e.g., *Tierney v. Sun-Re Cheese, Inc.*, ARB No. 00-052, ALJ No. 2002-STA-00012 (ARB Mar. 22, 2001). None of these justifications for tolling apply in this case. Furthermore, while the *Allentown* factors are not necessarily exclusive, Hoff has failed to establish any grounds which would support his request for equitable tolling in this case.

Hoff filed his complaint with OSHA on October 29, 2000, more than one year after Mid-States terminated his employment. Clearly, this is well beyond the 180-day statutory deadline for filing a STAA complaint. Citing *Allentown*, Hoff argues that while he filed in the wrong forum, FMCSA misled him into believing he had filed in the correct forum. He argues that the ARB should toll the limitations period because his “written complaint of August 24, 2000 coupled with his verbal notification to the FMCSA of his termination in September, 2000 and his repeated contact with FMCSA continuing until July 2001, constitute a complaint under the STAA.” Complainant’s Brief at 2. The *Allentown* case does not support a tolling of the limitations period in this case.

First, Hoff did not demonstrate, as required under *Allentown* equitable tolling principles, that he raised “the precise statutory claim in issue” with the FMCSA, i.e., that he was discharged in retaliation for activity protected by the STAA. Accordingly, the *Allentown* justification does not apply here. Moreover, the STAA regulations cite filing with another agency as a circumstance not justifying tolling. See 29 C.F.R. § 1978.102(d)(3) set forth supra. Further, although Hoff contends “[h]e was misled [sic] into believing that the legality of his discharge was under investigation,”<sup>4</sup> he does not contend that Mid-States misled him into filing a STAA complaint in the wrong forum. Finally, Hoff does not contend that there were any extraordinary circumstances that prevented him from filing in the correct forum.

Accordingly, the Board finds substantial evidence in the record to support the ALJ’s factual findings and we conclude that the ALJ correctly held that Hoff did not timely file his STAA complaint with OSHA. R. D. & O. at 6-7, citing 29 C.F.R. § 1978.102(d)(3).

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<sup>4</sup> Complainant’s Brief at 5.

**CONCLUSION**

Hoff failed to file his STAA complaint within 180 days of an alleged adverse action, and he has not shown that the statutory deadline should be equitably tolled. Therefore, his complaint is **DISMISSED**.

**SO ORDERED.**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Law Judge**

**JUDITH S. BOGGS**  
**Administrative Law Judge**